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Search and Seizure Since Chimel v. California

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Notes

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I. INTRODUCTION

The limited right of search and seizure is predicated on the fourth amendment of the United States Constitution.[1] The problem of adequately defining the permissible scope of search incident to a valid arrest has plagued the Supreme Court for many years. Recently, in *Chimel v. California*[2] the Court vastly changed the standards used to determine this permissible scope. One reason for the change was to return search incident to arrest to its position as an exigency to be used only when it is unreasonable to require a search warrant to be obtained. Another reason was to limit some of the questionable police practices that had mushroomed under pre-*Chimel* standards.

However, in addition to revitalizing fourth amendment protections, *Chimel* has engendered problems which did not exist prior to it. For example, since police could usually search an entire residence incident to arrest prior to *Chimel*, they were able to check for possible accomplices on the premises. This enabled them to protect themselves against possible harm from accomplices of the arrestee and aided them in preventing any accomplices from destroying evidence. Since *Chimel* generally prohibits searching every room on the premises, a reassessment of the methods the police may use to ensure their own protection and to preserve incriminating evidence has been required. Interrelated to this problem is the extent to which the plain sight doctrine is available to justify searches under the new *Chimel* standards. A third area of ambiguity is the effect *Chimel* was intended to have on searches of automobiles.

It is of great importance that the standards presented in *Chimel* be properly understood and interpreted by the courts and the police so that the public will receive the protection from unauthorized searches demanded by the Constitution. This Note will define, as precisely as possible, how the new standards have

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1. The amendment provides:
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. 395 U.S. 752 (1969).

affected the permissible scope of search and will examine how these standards have been implemented by the lower courts. The protections afforded by *Chimel* against questionable police practices will also be investigated and potential problems will be explored, placing particular emphasis on determining the correct application of *Chimel* in the above-mentioned three problem areas.

II. PRE-*CHIMEL* STANDARDS AND POLICE PRACTICES

A. THE *Harris* AND *Rabinowitz* STANDARDS

Prior to *Chimel* the permissible scope of search incident to arrest was governed by the standards established in *Harris v. United States*[3] and *United States v. Rabinowitz*.[4] These standards were based on the traditional concept of "control."[5] In *Harris*, the Court construed "control" to include areas that were not necessarily under the defendant's "physical control," but were deemed to be in his "constructive possession."[6] The *Rabinowitz* Court incorporated the *Harris* standards of "possession" and "control"[7] and made the reasonableness of the search the crucial factor.[8] "*Rabinowitz* has come to stand for the proposition, *inter alia*, that a warrantless search 'incident to a lawful arrest' may generally extend to the area that is considered to be in the 'possession' or under the 'control' of the person arrested," as those terms were construed in *Harris*.[9] It thus established that the absence of the traditional justifications for permitting warrantless searches—destruction of the evidence, officer protection or prevention of the suspect's escape—were not necessarily indicative of an unreasonable search.[10]

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3. 331 U.S. 145 (1947). The search in *Harris* encompassed the defendant's entire four-room apartment.

4. 339 U.S. 56 (1950). The search in *Rabinowitz* involved defendant's one-room place of business. Many closed and concealed areas were searched.

5. The "control" concept was used by the Supreme Court as early as 1925. *See* Carroll v. United States, 267 U.S. 132, 158 (1925).

6. "[T]he area which reasonably may be subjected to search is not be determined by the fortuitous circumstance that the arrest took place in the living room as contrasted to some other room of the apartment." 331 U.S. at 152.

7. 339 U.S. at 63.

8. *Id.* at 66.

9. 395 U.S. at 760. "*Rabinowitz* [thus] constituted a fundamental change in fourth amendment theory. . . . [S]earch incident to arrest, from its position as an historical exception, was brought squarely under the reasonableness clause of the [fourth] amendment." Comment, 28 U. CHI. L. REV. 664, 684 (1961).

10. This was evident in McCoy v. Cupp, 298 F. Supp. 329, 330 (D.

Although *Harris* and *Rabinowitz* greatly expanded the permissible scope of search over the standards that existed prior to them,[11] their major flaw was not simply expansion but rather the vagueness of the standards upon which this expansion was premised. The Supreme Court, in failing to define "reasonableness" and "control," left lower courts with the responsibility of making decisions without adequate standards for guidance.[12] As a result, the area was marked by many inconsistent decisions and the standards were expanded and distorted to such an extent as to be of no real value.[13]

Ore. 1969), wherein the court stated:

> Searches incident to lawful arrests are usually justified by the need to remove evidence or weapons from the suspects' control. . . . This reason is not the exclusive justification for such a search. A search may still be reasonable as incident to a lawful arrest even though there is no danger that the suspect will destroy evidence or produce a weapon. . . . Reasonableness, not necessity, is the controlling principle (citations omitted).

11. The Court in *Chimel* thoroughly analyzed the history of search and seizure incident to arrest. 395 U.S. at 755-60. In Marron v. United States, 275 U.S. 192 (1927), an early but important case in this area, the Court justified a search of an entire gambling saloon on the grounds that a lawful arrest had been made. The court said "[the officers] had a right without a warrant contemporaneously to search the place in order to find and seize the things used to carry on the criminal enterprise." 275 U.S. at 199.

The decision in *Marron* was based upon the application of property law concepts. The Court noted that the evidence was not on the defendant's person at the time of his arrest, but held that it was still within his immediate possession. That conclusion resulted from defining "possession" to mean "right to control" rather than "actual control," which is valid for property law purposes, but not from the standpoint of search and seizure. In his dissenting opinion in *Harris*, 331 U.S. 145 (1947), Justice Frankfurter stated:

> For some purposes, to be sure, a man's house and its contents are deemed to be in his "possession" or "control" even when he is miles away. Because this is a mode of legal reasoning relevant to disputes over property, the usual phrase for such non-physical control is "constructive possession." But this mode of thought and these concepts are irrelevant to the application of the Fourth Amendment and hostile to respect for the liberties which it protects.

331 U.S. at 164.

12. In *Rabinowitz*, "reasonableness" in the first instance was said to be for the district court to determine. 339 U.S. at 63. The Court in *Chimel* established its own standard of reasonableness, possibly reacting to Justice Frankfurter's dissent in *Rabinowitz* which stated:

> To say that the search must be reasonable is to require some criterion of reason. . . . It is not for this Court to lay down criteria that the district judges can apply. It is no criterion of reason to say that the district court must find it reasonable.

Id. at 83.

13. Particularly illustrative [of the unlimited expansion of the reasonableness test] was the extension of the concept of "control." What once was a useful tool became an analytically bankrupt concept. All content was negated by the invention of fic-

B. PAST POLICE PRACTICES

One effect of this expansion was to increase the number of searches incident to arrests to where they became more relied upon by the police than alternative methods of searching.[14] The primary reason is that such a search requires no written forms and no proof of probable cause before a magistrate prior to the search and is therefore administratively more convenient. Furthermore, police need not be concerned that a consenting party will later claim coercion because a search incident to arrest does not require consent. Consequently, more than 90 percent of all searches coming to the attention of the courts were incident to arrests.[15]

Another effect of this expansion was that police had almost free reign in deciding what would be searched. Searches were often conducted incident to arrest where an arrest would not normally be made were it not for the desire to search. Examples of this practice were arrests made for a minor offense, such as a traffic violation for which an arrest would not normally be made, because the officer suspected the person of a more serious offense and wanted to search for possible evidence.[16]

Furthermore, the "reasonableness" test usually permitted an extensive search of a residence after an arrest therein, since un-

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tions which enabled courts to find "control" in the most unlikely circumstances: When a suspect is said to "control" his entire residence simply by placing his key in the outside lock . . . United States v. Beigel, 254 F. Supp. 923 (S.D.N.Y. 1966), *aff'd*, 370 F.2d 751 (2d Cir. 1967), the concept has clearly lost its ability to distinguish the justifiable from the unreasonable police search. Note, 17 U.C.L.A. L. REV. 626, 631 (1969).

14. For example, during the years 1956 and 1957, 29 search warrants were issued in Detroit, approximately 30 in Milwaukee and 17 in Wichita. The number of search warrants has remained fairly constant during the years since 1956 and 1957. The frequency of search warrant usage appears to be much the same in other cities. L. TIFFANY, D. MCINTYRE & D. ROTENBERG, DETECTION OF CRIME 100 (1967).

15. *Id.* at 122.

16. *Id.* at 123, 131. *See, e.g.*, Fields v. State, 463 P.2d 1000 (Okla. 1969), in which a police officer recognized the defendant when his automobile approached them from the opposite direction. The officer testified that he knew the defendant as a "police character." One of the officers stated that he turned around and noticed that the car had no license tag light. The police then pulled the defendant over and even though he got out of his car, the police searched it, finding a gun in the glove compartment. A traffic citation charging the defendant with improper equipment was dropped. The court, in holding the search invalid, noted that the car was new and that when the defendant took it to a mechanic to have the light repaired he was informed that it was in working order. *See also* United States v. Robinson, No. 23,734 (D.C. Cir. December 3, 1970).

der the standards of *Harris* and *Rabinowitz* the entire residence was in the arrestee's "possession" or "control."[17] Thus "delayed" arrests became prevalent. Under this practice officers delayed arrests until the suspect could be seized in an area the police wanted to search. This enabled police to make an incidental search rather than having to obtain a warrant.[18] By restricting the permissible scope of search, *Chimel* has made many of these dubious practices useless because any evidence found will not be admitted into evidence.

III. PRESENT STANDARDS FOR DETERMINING PERMISSIBLE SCOPE

The majority in *Chimel* also based its decision on the "control" concept, holding that when an arrest is made, it is reasonable for the arresting officer to search the suspect's person and the area "within his immediate control." In employing the term "immediate," however, the Court narrowed the definition of "control" by construing it to mean the area from within which the arrestee may gain possession of a weapon or destructible evidence. The Court ruled out routinely searching rooms other than those in which an arrest occurs. It even ruled out searching concealed areas such as a desk or dresser drawers within that room itself. The justification for permitting a search incident to an arrest was the need to protect the police officer from possible harm by the arrestee who might obtain a weapon and to prevent the arrestee from destroying evidence.[19]

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17. *See* text accompanying notes 4-10 *supra*.

18. *See, e.g.*, McKnight v. United States, 183 F.2d 977 (D.C. Cir. 1950). In *McKnight* the arresting officers' intent to conduct a search incident to the arrest was made abundantly clear by the fact that they ignored many opportunities to arrest the defendant before he entered the house which was the object of the search, including the opportunity to arrest him when he walked directly past an officer stationed in front of the house. This intentional delay was the key factor in the court's reversal of McKnight's conviction.

19. 395 U.S. at 763. In defining the new standards the Court mentioned the term "reach" as well as the term "immediate control." These terms are generally synonomous, but unless the term "reach" includes the concept of "constructive reach," "immediate control" is a broader concept, since something can be under a person's "immediate control" without being within his physical "reach." In this Note, the term "immediate control" will be used, except when the term "reach" is mentioned by a court.

IV. IMPLEMENTATION OF *CHIMEL* BY THE LOWER COURTS

A. Effect on Lower Court Decisions

In *Derouen v. Sheriff*,[20] a case which illustrates how *Chimel* has altered the permissible scope of search, the defendant was arrested while sitting on his living room divan. The police searched the entire apartment incident to the arrest. Narcotics were found in a bedroom closet and dresser drawer, in the bathroom medicine cabinet and on the living room divan where the defendant remained seated during the search. While holding the evidence admissible under the *Rabinowitz* test, the court stated that under *Chimel* all of the evidence found would not have been admissible,[21] with the possible exception of evidence found on the divan which may have been within the defendant's immediate control.[22]

In a number of cases *Chimel* has caused entire searches to be held invalid and the evidence seized inadmissible. For example, a search of a light fixture which turned up a cache of marijuana was held illegal because the fixture was outside of the area of defendant's immediate control.[23] The seizure of marijuana hidden in a toothbrush container was held to be illegal because the arrest took place in the living room, and the container was hidden in a kitchen cabinet which was not within the defendant's reach.[24] The seizure of a boat trailer and outboard motor which officers observed through a crack in the garage door was held illegal because the defendants were arrested inside the house and outside the front door respectively, and the garage was not within the area of their immediate control.[25]

B. Criteria Used by the Lower Courts to Determine Permissible Scope

In order to determine whether the area searched was within the immediate control of the person arrested each of these

20. 461 P.2d 865 (Nev. 1969).
21. This court did not hold *Chimel* retroactive in effect. The Supreme Court did not state whether *Chimel* was to be retroactively applied to searches which took place before it was decided. The majority of courts have held it prospective in effect; *see, e.g.*, United States v. Bennett, 415 F.2d 1113 (2d Cir. 1969).
22. 461 P.2d at 867.
23. State v. Rhodes, 80 N.M. 729, 460 P.2d 259 (1969).
24. Fresneda v. State, 458 P.2d 134 (Alaska 1969).
25. Ashby v. State, 228 So. 2d 400 (Fla. Ct. App. 1969).

courts had to employ certain criteria. These included, for example, the size of the room, whether the arrestee was handcuffed or otherwise subdued, the size and type of the evidence, the number of people arrested and the number of officers present. The criteria used in each case will depend on the facts of the particular case, but the standards to which these criteria will be applied remain the same—the search must be limited to the area of defendant's immediate control, construing that phrase to mean the area from within which the arrestee may obtain a weapon or destructible evidence. If, for example, the evidence were in a locked suitcase and the arrestee was handcuffed to his bed, the evidence would probably not be within his immediate control. If he was not handcuffed, however, and if the suitcase was open, it may be considered to be within his immediate control. The result would depend on other criteria, *e.g.*, the number of police present and his distance from the suitcase. Thus, a mechanical application of the new standards will not adequately solve the problem.[26]

For example, in *Holmes v. State*,[27] the court held that evidence found within a distance of approximately eight feet from where the defendant was sitting when he was arrested was admissible because the evidence was limited to the "area within [defendant's] immediate control."[28] The problem with this decision is that whether the evidence was in fact within defen-

26. In Scott v. State, 7 Md. App. 505, 256 A.2d 384 (1969), a case in which *Chimel* was not accorded retroactive effect, the defendant was arrested in his bedroom pursuant to an arrest warrant for possession of narcotics. A search incident to the arrest was made in the bedroom and evidence was discovered in the pockets of two jackets—one on the bed and the other on the back of the bedroom door. The court held the seizure was valid, because "reasonable," since the evidence was in the defendant's control as that phrase had been construed prior to *Chimel*. However, it noted:

> [A]s the search is tested by its reasonableness and its scope is justified by the need to protect the arresting officer and to prevent the destruction of evidence, we cannot construe *Chimel* to mean that the area is confined to that precise spot which is at arm length from the arrestee at the moment of his arrest. He may well lunge forward or move backward or to the side and thus into an area in which he might grab a weapon or evidentiary items then within his reach before the officer could, by the exercise of reasonable diligence, restrain him. We think that *Chimel* requires that the State show that the search was conducted and items were seized in an area "within the reach" of the arrestee in this concept, as for example, by evidence as to the location of the items with respect to the whereabouts of the arrestee, the accessibility of the items and their nature.

Id. at 513, 256 A.2d at 389.

27. 228 So. 2d 417 (Fla. Ct. App. 1969).

28. *Id.* at 419.

dant's control would depend on some of the above-mentioned or similar criteria, none of which were discussed by the court. Since not all evidence found eight feet from a defendant will be within his immediate control, the court complicates the message to the police, who must follow the new standards, by not explaining why it held this evidence was in fact within the defendant's immediate control.[29]

Even more unfortunate than an unexplained decision is one that incorrectly interprets the new standards. In one such case,[30] the defendant was arrested at the door to his motel room and a search incident to the arrest turned up evidence in a suitcase under the only bed in the room. The court held the search was legal under *Chimel*, "[since] the search was confined to the single motel room rented and actually occupied by the [defendant]."[31] This decision conflicts with *Chimel* in two ways. The search in the instant case was permitted because the defendant was in actual physical "possession" of the room. However, this was one of the standards that *Chimel* specifically overruled.[32] In addition, *Chimel* prohibited searching through "closed or concealed areas" in the room wherein the arrest occurs.[33] Since the court permited the search of the suitcase because the arrestee was in "possession" of the room, it did not discuss whether the suitcase was in the area of defendant's "immediate control." If it was not, a search of the closed suitcase would violate *Chimel* even apart from the court's mistaken "possession" argument.[34]

In another case,[35] the defendant was sitting on her bed when the police arrested her for a parole violation. The police then searched her purse which had been lying on the floor next to the bed and found heroin. The court, after correctly recognizing how *Chimel* has limited the permissible area of search, stated:

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29. If the *Holmes* court found eight feet to be within the defendant's control, would it have found the same if the distance had been nine feet or 15 feet? "[D]ifferences . . . of degree must not be capricious; the differences must permit rational classification." United States v. Rabinowitz, 339 U.S. at 79 (dissenting opinion). Obviously there can be no rational classification without the reasons for so classifying.

30. Brewer v. State, 228 So. 2d 582 (Miss. 1969).

31. *Id.* at 584.

32. *See* text accompanying notes 7-9 *supra*.

33. 395 U.S. at 763.

34. In Scott v. State, 7 Md. 505, 513, 256 A.2d 384, 389 n.6 (1969) the court stated: "It would seem that a seizure of a weapon or destructible evidence in a locked drawer in the immediate presence of the arrestee in the literal sense would be beyond the permissible scope of a search.

35. People v. Belvin, 275 Cal. App. 2d 955, 80 Cal. Rptr. 382 (1969).

> [It] is . . . evident that normal extensions of the person remain subject to search and that articles customarily carried by an arrested person fall within the area of his immediate control. In the category of such articles we include a woman's purse, a man's wallet, a jacket, a hat, an overcoat, and a brief case in use at the time of the arrest, *even though these articles may not be on the immediate person of the arrestee at the moment of arrest.* . . .[36]

Thus the court concluded that since the defendant's purse was in use by her at the time of her arrest, "[it] legally amounted to an extension of her person" and could be searched whether the defendant was in the room or not.[37] If, as this court seems to permit, the particular item can be searched whether or not it is in the defendant's "immediate control," the police would be able to walk through rooms other than those in which the arrest occurred in order to find the item.[38] This decision, therefore, circumvents *Chimel's* specific prohibition against routinely searching rooms other than those in which an arrest occurs or even other areas of the same room that are not under the defendant's "immediate control."

Since police practices are affected to a greater extent by the lower courts' interpretation of the new standards than by the standards themselves, an unexplained or incorrect interpretation of the standards hinders the police in obtaining the information necessary to rectify those practices the Supreme Court thought questionable.

V. SEARCHES OF PERSONS OTHER THAN THE ARRESTEE

Up to this point the cases discussed have involved only searches of the arrestee. However, situations do arise in which other persons are present at the arrest. The danger then is that an arrestee may be able to utilize another person to obtain a weapon or to destroy evidence from an area outside of his "immediate control." This situation arose in *United States v. Manarite*.[39] In that case two defendants challenged a search of their apartment and a seizure of obscene matter found therein. The challenge was based solely on the ground that the officers went

36. *Id.* at 958, 80 Cal. Rptr. at 384 (emphasis added).
37. *Id.* at 959, 80 Cal. Rptr. at 384.
38. One potential problem, for example, is that a handbag may be in a closet which would permit the police to enter the closet. Furthermore, it may not be evident which handbag was then in use and the police may have to open more than one bag in order to find the correct one.
39. 314 F. Supp. 607 (S.D.N.Y. 1970).

beyond the permissible scope of search. One of the defendants was in the custody of an officer when the two of them entered the living room. At that point the officer noticed two men sleeping on two different couches. The two men, who were not recognized by the officer, were directed to stand. One stood about two feet from a small table and the other about three feet from another table. Both were facing the defendant who was standing across the room from them. Neither man was restrained in any manner. The officer, aware that weapons had already been found on the premises, and seeing some of the evidence he was looking for on top of one of the tables, proceeded to search the two tables. The court held:

> [It] was entirely reasonable and absolutely necessary for the safety of the law enforcement officials to consider the two men as [the defendant's] possible agents or accomplices, in effect as extensions of [defendant's] physical presence, constructively placing [the defendant] within reach of the two . . . tables. Moreover, since a gun and ammunition had already been found in the apartment, it was not unlikely that other weapons would be secreted throughout the apartment. . . .
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> The searches of, and seizures from, the . . . tables which were within the reach of the two unidentified men and therefore could be reasonably considered to be in the constructive reach of the arrested person, were properly incident to the lawful arrest as defined in *Chimel*. . . . There was no search of any room which was not occupied by the [defendants]. . . . In fact, they did not conduct a search of any area of the living room or the . . . bedroom [wherein the arrest occurred] which was not proximate to either [of the defendants] or the unidentified men. . . .
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> They made a quick search of the bathroom before [one defendant] went in to change [clothes] and a search of one of the living room chairs before [the other defendant] sat down . . . .[40]

The facts of *Manarite* illustrate the most serious consequence of the *Chimel* decision: the arrestee's spouse or accomplice may destroy evidence in any area not legally subject to search. In *Chimel*, for example, the police were waiting for the defendant in his home and arrested him at the door. A thorough search followed in which the police required the wife to move the contents of drawers in order to facilitate the search. Much evidence was found in this manner.[41] Had the police simply arrested Chimel without searching the house, his wife would probably have destroyed the evidence. Even though the police may be able to search the area within the "immediate control" of the wife if she was "an extension of the arrestee's physical presence," as in

40. *Id.* at 615-16.
41. 395 U.S. at 753-54.

Manarite,[42] they could not search the entire house simply because the wife was present. To do so would, in effect, revive the standards of *Harris* and *Rabinowitz*.[43]

VI. THE PLAIN SIGHT DOCTRINE AND THE *CHIMEL* RATIONALE

The standards in *Chimel* restricting the permissible scope of search only apply to searches made incident to arrest. Thus the police can justify a broader search for evidence under alternative bases for search. Two obvious alternatives are consent and warrant searches. In most cases, however, the plain sight doctrine is the only viable alternative to incident-to-arrest searches.[44]

The plain sight doctrine allows the seizure of objects in plain sight of the officer if he has a right to be in a position to see them.[45] Concomitantly, the plain sight doctrine does not apply where the officers' presence is illegal.[46] The purpose of this rule is to allow the police to seize any evidence which they might otherwise be forced to disregard when the evidence is in open view.[47]

> The decision in *Chimel* proscribes searches outside the area [of defendant's] immediate control. . . .
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> There is no . . . justification . . . for searching through . . . desk drawers or other closed or concealed areas [in the room where the arrest occurs].[48]

Since something in plain sight is by definition not "closed or concealed," and since courts have held that something seized in plain sight is not the product of a search, *Chimel* impliedly seems to permit the seizure of something in plain view in the room in

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42. *See* text accompanying note 40 *supra*.

43. *See* text accompanying notes 5-9 *supra*.

44. This discussion relates only to searches in buildings. An additional exception relating to automobile searches is discussed in that section. *See* text accompanying notes 71-78 *infra*.

45. Harris v. United States, 390 U.S. 234, 236 (1968); Ker v. California, 374 U.S. 23, 42-43 (1963).

46. United States v. Scott, 149 F. Supp. 837 (D.D.C. 1957).

47. Courts have generally circumscribed having to decide the "reasonableness" of taking something observed in plain view, by holding that it is not a search, but only a seizure. Harris v. United States, 390 U.S. at 236 (1968). However, the obviousness of something in plain view is a form of exigency in the sense that failure to act immediately when confronted with the evidence in this manner may result in its disappearance. United States v. Thweatt, No. 22,772 (D.C. Cir. June 30, 1970), at 8.

48. 395 U.S. at 763.

which the arrest occurs, even if it is not in the area of defendant's "immediate control."[49]

There is a question, however, whether the policy underlying *Chimel*—that warrantless searches are inherently unreasonable except when certain exigent circumstances exist—would permit the seizure of items in plain sight in any room that it was not essential for the police to enter, either to make the arrest or to get to the room where the arrest is to be made. The argument against permitting the seizure of items in plain sight in any room is that the plain sight doctrine would be transformed from its present function into an alternative method of search. The doctrine itself prohibits seizures where the officers' presence is illegal.[50]

It can be maintained, however, that the underlying rationale behind search incident to arrest—preventing the police from being harmed and preventing destruction of the evidence—would permit the police an over-all view of the other rooms in the premises and thereby make their presence in any room legal. This over-all view would not be a detailed search, as permitted by *Chimel* in the area of defendant's immediate control, but would consist of a cursory glance in each room to insure that there were no accomplices on the premises that could harm the police. Dicta in *People v. Mann*[51] would permit exactly that result. In that case the defendant was arrested in the entryway of his apartment. Since he was not fully dressed, the police directed him to do so and they followed him to the bedroom. There they found the defendant's accomplice in the crime, and in open view on top of a bureau, were the stolen items. The court upheld the seizure of the evidence, holding the statement by the *Chimel* Court, that there can be "[no] point of rational limitation, once

49. A number of lower courts, in decisions subsequent to *Chimel*, have held that the plain sight rule is still valid. In United States v. Badilla, 434 F.2d 170 (9th Cir. 1970), a narcotics agent knocked on the defendant's motel door and arrested him when he opened it, observing simultaneously a packet which appeared to be heroin. The defendant then indicated that there was additional heroin in the kitchen. Both were seized by the agent. At trial, the defendant claimed both seizures were unreasonable within the meaning of *Chimel*. The appellate court upheld the seizure of the packet in open view basing its decision on the plain sight rule and holding that this was not unreasonable within the meaning of *Chimel*. It held the seizure of the heroin from the kitchen reasonable but stated that it would have been unreasonable under *Chimel* had the defendant not consented to the seizure. *See also* United States v. Avey, 428 F.2d 1159 (9th Cir. 1970).

50. *See* text accompanying notes 45-46 *supra*.

51. 61 Misc. 2d 107, 305 N.Y.S.2d 226 (1969).

the search is allowed to go beyond the area from which the person arrested might obtain weapons or evidentiary items,"[52] inapplicable in this situation.[53] It is only logical that this is consistent with *Chimel* because the defendant may easily obtain a weapon or destructible evidence, or possibly escape, if the police allow him to leave their view once he is under arrest.[54] However, the court went further and stated that even if the defendant had been dressed, the police had the right to look around and seize any evidence in open sight. The court concluded:

> Arrest gives the police the right to search the person and the immediate surroundings of the arrestee; surveillance of a prisoner and the right to check for confederates or accomplices extends that right to permit the police *an over-all view of the other rooms in the premises*, with a concomitant right to seize evidence or weapons in plain sight.[55]

Since *Chimel* restricts the permissible scope of search to the area within the arrestee's "immediate control,"[56] it was inevitable that problems would arise when police believed that accomplices of the arrestee might be on the premises in areas outside of the defendant's "immediate control." This problem was evident in *United States v. Manarite*[57] in which the court held that two men, who were in the presence of the arrestee and not under arrest, were "extensions of his physical presence"[58] and allowed the police to search them and the area under their 'immediate control." The search was allowed in order to prevent the men from obtaining a weapon or destructible evidence. This rationale can be extended to permit the police an over-all view of the other rooms in the premises without exceeding the parameters established in *Chimel*; in fact, the standards in *Chimel* provide the foundation for this expansion. *Chimel* prohibits "routinely searching any room other than that in which an arrest occurs . . . ."[59] It exempts from this prohibition "well-recognized exceptions."[60] The purpose of allowing the police to search incident to arrest in the first instance is to prevent them from being harmed and to prevent evidence from being destroyed. These

52. 395 U.S. at 766.
53. "This case calls for a further refinement of the *Chimel* doctrine, for here there was no search, in the real sense of the word, . . . but [only] a seizure." 61 Misc. 2d at 112, 305 N.Y.S.2d at 231.
54. In addition, most courts would not consider this a search. *See* note 47 *supra*.
55. 61 Misc. 2d at 113, 305 N.Y.S.2d at 232-33 (emphasis added).
56. 395 U.S. at 763.
57. *See* text accompanying notes 39-43 *supra*.
58. *See* text accompanying note 40 *supra*.
59. 395 U.S. at 763.
60. *Id.*

justifications end outside the area of defendant's "immediate control," which, by definition, is the area from which the arrestee cannot obtain a weapon or destructible evidence. However, just as another person in the same room as the arrestee can be "an extension of the arrestee's physical presence," justifying a search of the area under his "immediate control,"[61] so may a search of another room be justified in order to locate these other persons. There is a greater possibility of an accomplice in another room, of whom the police are unaware, destroying evidence or harming an officer than there is from an accomplice in plain view of the officer. To prevent the destruction of evidence or harm to the officer an over-all view of the other rooms in the premises should be permitted.[62]

VII. SEARCH OF AN AUTOMOBILE

It is unclear whether the new criteria enunciated in *Chimel* will also apply to automobiles since they have traditionally been subject to different tests of reasonableness under the fourth amendment because of their mobility. Although the Court only briefly alluded to automobile searches in *Chimel*,[63] the policy underlying search incident to arrest favors its application to automobiles. In *Preston v. United States*,[64] the Court disallowed a

61. *See* text accompanying note 40 *supra*.

62. In his dissenting opinion in *Chimel*, Mr. Justice White pointed out that an effect of *Chimel* would be to decrease the possibility of obtaining any evidence, since in many cases an accomplice or spouse of the arrestee will destroy evidence while a warrant is being obtained. Justice White suggested that where probable cause to search is independently established and would be sufficient to obtain a warrant for a broader search for evidence, the arrest is a sufficient exigent circumstance to justify further police action. He stated that if in fact there were no probable cause to search, there could be adequate redress in a judicial hearing where any illegally seized evidence could be excluded. 395 U.S. at 780-82. The majority, however, could not accept the view that fourth amendment interests are vindicated so long as the evidence seized without probable cause is not admitted into evidence. It said that the fourth amendment was not only to redress grievances but also to prevent unreasonable searches, and thus it refused to allow a search on independently existing probable cause. 395 U.S. at 766 n.12.

63. The Court said:

> Our holding today is of course entirely consistent with the recognized principle that, assuming the existence of probable cause, automobiles and other vehicles may be searched without warrants "where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought."

395 U.S. at 764 n.9.

64. 376 U.S. 364 (1964). *Preston* was one of the major cases relied on by the Court as authority for *Chimel*.

search of the defendant's car as incident to arrest, because the search took place when the defendant was already in jail and the car was in custody in the police garage. The Court held:

> [t]here was no danger that any of the men arrested could have used any weapons in the car or could have destroyed any evidence of a crime. . . . Nor . . . was there any danger that the car would be moved out of the locality or jurisdiction.[65]

The only reasoned distinction, then, between a search of a residence and the search of an automobile is that in some circumstances a car is mobile and can be removed from the jurisdiction. If, as was recognized in *Preston*, the car is not truly mobile, there is no reason to make this distinction and the standards in *Chimel* should apply to automobile searches.

The question then becomes, can an entire car be under the "immediate control" of an arrestee? Under *Harris* and *Rabinowitz* the entire car could be searched since it was in the defendant's "possession" or "control," as those terms had previously been construed.[66] This result would probably not be obtained under *Chimel*. In a case on point,[67] the defendant, after being stopped by police, got out of his car and approached the officers' vehicle. One of the officers frisked the defendant while the other searched his car incident to the arrest. A gun was found in the glove compartment. The court held that under the standards established in *Chimel* there was no justification for searching the glove compartment of the car since it was not " 'within his reach,' nor in plain view."[68] The obvious rationale behind this decision is simply that since the defendant was in police custody, he could not obtain a weapon or destructible evidence from the car and for that same reason, the car was not in fact mobile.

A similar result was reached in *Colosimo v. Perini*.[69] In that case, the defendant was arrested after he was observed stealing from cars parked at an airport. After he and his accomplice had been taken to the police station, a key was discovered in the rear seat of the police car. When the defendants denied having any knowledge of the key, one of the officers, without first obtaining a search warrant, returned to the airport parking lot where

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65. *Id.* at 368.

66. *See, e.g.*, People v. Roland, 270 Cal. App. 2d 639, 76 Cal. Rptr. 72 (1969), in which the search of a trunk of a car after the arrest was permitted.

67. Fields v. State, 463 P.2d 1000 (Okla. 1969). *See* note 16 *supra* for a discussion of this case.

68. *Id.* at 1004.

69. 415 F.2d 804 (6th Cir. 1969), *vacated and remanded*, 399 U.S. 519 (1970).

their car had remained in police custody. The officer then opened the trunk and seized the evidence. The lower court, relying on *Rabinowitz*, concluded that the search was valid. The appellate court reversed, stating:

> With the person . . . suspected of crime and the automobile to be searched both in police custody, the precipitous action of a warrantless search is no longer justified. It is true that in *Preston* the vehicle was searched at a point away from the scene of the arrest, while here the vehicle remained at the place where the defendant was arrested. *Chimel*, however, persuades us that such factual distinction is not of controlling importance.[70]

The conditions under which automobiles may be searched, however, recently came under review by the Supreme Court in *Chambers v. Marony*[71] and its decision in that case may prevent application of the *Chimel* standards in this area. The issue in *Chambers* concerned the admissibility of evidence seized from a car in which the defendant was riding at the time of the arrest. After the defendant was arrested the car was taken to a police station and there thoroughly searched without a warrant.[72] The Court, citing *Preston*,[73] held that the search could not be justified as incident to arrest,[74] but could be justified as an exception to the warrant requirement, established in *Carroll v. United States*,[75] by which it is possible for a police officer to search a car if he has probable cause to believe that there is contraband pres-

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70. *Id.* at 806. The court concluded that *Chimel* persuaded it that *Preston* was controlling in this case and therefore it did not decide whether *Chimel* was to be retroactively applied. The court first had to distinguish its decision in Crawford v. Bannan, 336 F.2d 505, 507 (6th Cir. 1964), in which it held a search valid on facts very similar to *Perini*. In *Crawford*, the court held, believing that *Rabinowitz* justified such a holding, that the fact that at the time of the search there was no danger of harm to the officers or loss of evidence of the crime was not of controlling importance if the search was "reasonably contemporaneous" with the arrest. It distinguished *Crawford* on the basis of "further illumination" of the *Preston* decision by the Court in *Chimel*.

The court in *Perini* did not mention who owned the car searched, but it noted that the defendant, having been charged with the possession of burglar tools, was a "person aggrieved" by the search of the car and had standing to object to the search. 415 F.2d at 804.

71. 399 U.S. 42 (1970).

72. *Id.* at 44.

73. Preston v. United States, 376 U.S. 364 (1964).

74. There are . . . alternative grounds *arguably* justifying the search of the car in this case. In *Preston* . . . the arrest was for vagrancy; it was apparent that the officers had no cause to believe that evidence of crime was concealed in the auto. . . . Here the situation is different, for the police had probable cause to [search].

399 U.S. at 47.

75. 267 U.S. 132 (1925).

ent.[76] No arrest is necessary.[77] The Court added:

> *Carroll* . . . [does not] require or suggest that in every *conceivable circumstance* the search of an auto even with probable cause may be made without a . . . warrant. . . . But . . . the opportunity to search is fleeting since a car is readily movable. Where this is true, as in *Carroll* and the case before us now, if an effective search is to be made at any time, either the search must be made immediately without a warrant or the car itself must be seized and held without a warrant for whatever period is necessary to obtain a warrant for the search.
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> . . . Only in exigent circumstances will the judgment of the police as to probable cause serve as a sufficient authorization for a search.[78]

Despite these cautionary words, if a search can be made in the instant case where the car was in police custody and thus not movable, the occupants were in jail and could not escape or destroy the evidence and the evidence seized was not contraband, when can a search not be made? The majority emphasized that these other "conceivable circumstances" did not include cases which involved state statutes which permit seizure of a car if it was an instrumentality of the crime,[79] nor did they involve an abandoned or stolen vehicle.[80] There is an obvious discrepancy in the Court's statement that the car in the instance case was movable, as was the car in *Carroll*. In *Carroll*, the car was on the highway where it was stopped and searched contemporaneously. In the instant case the police had custody of the car and

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76. 399 U.S. at 48.

77. Despite the existence of this rule, police have invariably relied instead on search incident to arrest, consent search, or the rule which permits a routine inventory of a vehicle lawfully taken into police possession. The area in which the *Carroll* rule has been most often used has been to allow officers to search abandoned vehicles.

Perhaps the most significant reason why the *Carroll* rule is as little used as it is lies in the fact that the power to search the vehicle does not also include the right to search the occupants, usually a practical necessity. L. TIFFANY, D. MCINTYRE & D. ROTENBERG, DETECTION OF CRIME 173 (1967). The Supreme Court has indicated that assuming there is probable cause to believe a vehicle contains contraband "we see no ground for expanding the ruling in the *Carroll* case to justify . . . [a search of the occupants of a car] as incident to the search of a car." United States v. Di Re, 332 U.S. 581, 587 (1948).

78. 399 U.S. at 50-51. In his dissent in *Chambers*, Mr. Justice Harlan noted that the Court disregarded the fact that *Carroll* and each of the Court's decisions upholding a warrantless vehicle search on its authority, involved a search for contraband and that although subsequent dicta have omitted this limitation, the *Carroll* decision had not until this case been held to authorize a general search of a vehicle for evidence of crime, without a warrant, in every case where probable cause exists (citations omitted). *Id.* at 62 n.7.

79. *E.g.*, Cooper v. California, 386 U.S. 58 (1967).

80. "The question here is whether probable cause justifies a warrantless search in the circumstances presented." 399 U.S. at 49-50 n.7.

could have obtained a warrant for the search.[81]

Justice Harlan, dissenting in *Chambers*, noted that the Court's many decisions in this area imposed a general principle that a search without a warrant is not justified by the mere knowledge of the officers showing probable cause and that any exemption from this rule must be no broader than necessitated by the circumstances. In *Chimel*, for example, the Court recognized that an arrest creates an emergency situation justifying a warrantless search of the arrestee's person and of the area from within which he may gain possession of a weapon or destructible evidence. Since the exigency causing this exception extends only that far, the search may go no further. Similarly, in *Terry v. Ohio*[82] it was held that a warrantless search in a "stop and frisk" situation must be strictly limited by the exigencies which justify its initiation and any intrusion beyond what is necessary to protect the personal safety of the officer is forbidden.[83] The purpose of the moving vehicle exception is to prevent the evidence from being lost or destroyed by being removed from the jurisdiction. Thus the car's mobility is an exigency that permits a warrantless search, assuming the presence of independently existing probable cause. However, when the car cannot be removed from the jurisdiction, the exigency justifying the warrantless search does not exist and a warrant should be required.

Although the Court used *Preston* as its authority for disallowing the search as incident to arrest, the Court's decision in *Chambers* has effectively limited the value of *Preston*. Two other decisions that were vacated and remanded in light of *Chambers* help illustrate this effect. In one case,[84] the defendant's car was stopped by a sheriff and he was arrested as he emerged from the

81. In *Preston* a search was not permitted in a very similar situation and the Court expressly stated that there was no available exception that would have permitted the search without a warrant. 376 U.S. at 367. In *Chambers*, the Court tried to distinguish *Chambers* from *Preston* on its facts. In dissent, Mr. Justice Harlan stated:

> The Court's reliance on the police custody of the car as its reason for holding "that the search of the car without a warrant failed to meet the test of reasonableness under the Fourth Amendment" . . . can only have been based on the premise that the more reasonable course was for the police to retain custody of the car for the short time necessary to obtain a warrant. The Court expressly did not rely, as suggested [in this case], on the fact that an arrest for vagrancy provided "no cause to believe that evidence of crime was concealed in the auto."

399 U.S. at 65.

82. 392 U.S. 1 (1968).

83. *See* 399 U.S. at 61-62.

84. Wood v. Crouse, 417 F.2d 394 (10th Cir. 1969), *vacated and remanded*, 399 U.S. 520 (1970).

car. The defendant was searched and a stolen check was found, but the car was not searched at that time. Shortly after the defendant was jailed, a highway patrolman noticed the defendant's abandoned car alongside the highway. After obtaining the keys from the sheriff, the patrolman drove the car to the jail where approximately twenty minutes after the defendant had been arrested, it was searched for the first time. Many stolen checks were found. The appellate court, relying on *Chimel*, had reversed the conviction. In another case,[85] a police officer observed guns in plain sight in a man's car and arrested him. No search was made at the scene of the arrest. The entire car was later searched at the police station after the defendant had been arrested.

Neither state attempted to use the *Carroll* rule to validate the search. Both attempted to use the search incident to arrest doctrine and both were rejected by appellate courts. The searches in these cases, and in *Perini*, are typical of those which *Preston* and *Chimel* have prohibited. The decision in *Chambers* thus greatly weakens their restraining effect.

VIII. CONCLUSION

The new standards defining the permissible scope of search incident to arrest permit a search of the arrestee and the area within his immediate control. In addition, a search of the area under the immediate control of another person, not under arrest, probably will be permitted if that person is deemed to be an extension of the arrestee's physical presence.[86] It is also possible that the police may be permitted an over-all view of the other rooms in the premises. This view would be restricted to a cursory glance through each room for possible accomplices. A detailed search outside the area of defendant's immediate control would not be permitted.

It appears that these new standards will also apply to automotive searches and this should stop the police from completely searching the car every time they make an arrest. It should also help eliminate the practice of making arrests for minor offenses simply to justify an otherwise impermissible search. The exception established in *Carroll*, permitting a search on independently

85. Heffley v. Hocker, 420 F.2d 881 (9th Cir. 1969), *vacated and remanded*, 399 U.S. 521 (1970).

86. The only case discussing this situation is United States v. Manarite, 314 F. Supp. 607 (S.D.N.Y. 1970). *See* text accompanying notes 39-43 *supra*.

existing probable cause, should only apply if the car is truly mobile and can be moved from the jurisdiction.[87] If the car is not in fact mobile, the justification for an immediate search evaporates since a search warrant can be obtained. Thus, a reconsideration of the ruling in *Chambers* by the Supreme Court appears to be warranted.[88]

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87. In his dissent in *Chambers*, Justice Harlan noted that the fourth amendment proscribes unreasonable seizures as well as searches and suggested that the car could be seized for the short period necessary to obtain a warrant, which would involve less of a violation of privacy than a complete search of the car. 399 U.S. at 63. The majority conceded this possibility, but stated that the question as to which involved the greater violation of privacy, the search or the seizure, was debatable. *Id.* at 51-52.

88. United States v. Mehciz, No. 25,868 (9th Cir. January 11, 1971), would seem to be an ideal case for a reconsideration of *Chambers*. In that case, the defendant, who was carrying a small suitcase, was arrested as he disembarked from an airplane. Following the arrest,

> The officers [who had obtained information that the defendant would be arriving with illegal drugs] took the suitcase and handcuffed [the defendant] so that there was no danger that he would get to the suitcase, obtain a weapon or destroy any evidence that might be found inside. *Id.* at 2.

The defendant argued that a search warrant should have been obtained since the suitcase was not "within his immediate control" as that term was construed in *Chimel*.

The court, after stating that "[it was] not unimpressed by the logical conclusion which [defendant] draws from his interpretation of the *Chimel* rule . . . ," upheld the conviction in light of *Chambers*. *Id.* at 3. Its reasoning was as follows:

> The Court in *Chambers* expressly rejected the suggestion [that the automobile should have been impounded without a search until a search warrant could be obtained] saying that "[f]or constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment." 399 U.S. at 52. We believe that the factors underlying the decision in *Chambers*, i.e., mobility and the lack of undue intrusion, apply with at least equal force to the suitcase involved here.
>
> There is little doubt but that the rule of *Chimel* is apparently not applicable to automobile searches per the decision in *Chambers*. The Supreme Court has expressly held that "for the purposes of the Fourth Amendment there is a constitutional difference between houses and cars." While we are not necessarily of the view that *Chimel* is limited to house searches, we think it only reasonable to conclude that there is a corresponding "constitutional difference" between a house and a suitcase. *Id.* at 3-4.

The court also attempted to justify its decision on the basis of Draper v. United States, 358 U.S. 307 (1959), which the court said was factually indistinguishable from the situation in *Mehciz*. It noted that *Draper* was mentioned in *Chimel*, 395 U.S. at 760 n.4, and was not overruled therein.

In *Chimel*, the Court rejected the view that a search on independ-

ently existing probable cause should be permitted, 395 U.S. at 764, but it noted that there was an exception to this rule for "automobiles and other vehicles . . . because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought." *Id.* n.9. *See* text accompanying notes 63-68 *supra*. Although the reasoning behind *Chambers* is open to question (*see* text accompanying notes 71-83 *supra*) it had not been applied to anything other than a vehicle until this case.

The question of whether a suitcase in police custody is mobile, especially when its owner is also in police custody, will not be discussed. The additional question of whether there is a constitutional difference between a house and a car will also not be discussed. These questions would not have arisen if *Chambers* had been more clearly reasoned. *Chambers* caused the confusion in *Mehciz*, in which that court stated that *Chambers* made *Chimel* inapplicable to cars. The *Chambers* decision was based on the doctrine of independently existing probable cause; *Chambers* specifically stated that the search could not be justified as incident to arrest. 399 U.S. at 47.

One explanation for this decision is that because of the nature and amount of the evidence seized—12,000 tablets of LSD—the court was unwilling to exclude the evidence because of simple police error. This would account for the court's attempted reliance on *Draper*, which was cited in *Chimel* simply as an example of the divergent opinions that had resulted from *Rabinowitz*.

Judge Ely, dissenting in *Mehciz*, noted that the opportunity to search was not fleeting and that the immediate search of the suitcase was a greater intrusion than was the search of a car in *Chambers*. He concluded:

> It is, I hope, unnecessary for me to add that I hold no sympathy for the [defendant]. Admittedly, my approach is conservative, but I cannot conscientiously ignore the tradition that judges of inferior courts are compelled, whether they like to do so or not, to apply the controlling principles of the Supreme Court. Our function is not to apply the law as we might like it to be, or that we may speculate that it may become, but to apply it as it is.

United States v. Mehciz, No. 25,868 (9th Cir. January 11, 1971) at 10.